

Workgroup 1 Report: May 5, 2011

Workgroup No. 1 has been asked to address the following issues:

- a. **Rule distinguishing the roles of a fiduciary, court-appointed attorney, and guardian ad litem.**
 - i. **EX 1:* Rule clarifying the fiduciary's role in litigation, i.e. whether the fiduciary has a duty to attend litigation unless requested by the court.

Specifically, under what circumstances may an attorney proceed with what is primarily civil litigation without the fiduciary present to avoid the fees associated with both the fiduciary and attorney appearing? In addition, under what circumstances may a fiduciary take action by signing documents to be filed with the Court rather than requiring that it be done through an attorney, i.e. filing annual reports, accountings, etc.? Some Workgroup members believe that probate litigation should be considered much like civil litigation in which a cost versus benefit analysis is used to evaluate litigation strategy.

- b. **Rule clarifying the circumstances under which a guardian ad litem should be appointed and the duration of the appointment.**

Rule 10, Arizona Rules of Family Law Procedure can serve as a guide to useful language regarding the appointment of a Guardian Ad Litem which has become to be know in domestic relations cases as a "Best Interests Attorney".

A.R.S. §14-1408 refers to a representative. Using that statute as the starting point, a Court Rule that clarifies the areas of concern regarding a Guardian Ad Litem would be helpful. Rule 10, Arizona Rules of Probate Procedure seems to be logical place to address the issues raised.

Examining NAELA's Recommendation: Role of Guardian ad Litem versus Court-Appointed Attorney may be helpful. The following are some of Callie's thoughts from NAELA's Recommendation that had been circulated for consideration:

"Much confusion surrounds the role of the Guardian ad Litem (GAL) versus Court-Appointed Counsel (CAC) in probate matters. Unfortunately, this confusion has seemingly resulted in a trend to have more split-duty appointments, which drives up the costs of proceedings. Our probate code requires the appointment of an attorney or CAC for an alleged incapacitated adult or protected person in guardianship and conservatorship proceedings. It does not require the appointment of a GAL. So, when is it appropriate to appoint both a CAC and GAL or a GAL rather than a CAC? Guidelines need to be developed as to the foregoing, as well as the continuing duties and responsibilities.

Our Rules of Professional Conduct provide for attorney's representation of an individual with diminished capacity, suggesting that a GAL should only be appointed in limited circumstances. If a GAL is appointed it should be with a specific assignment and his role should

be limited in scope and duration. A GAL should be appointed sparingly and, in the event CAC is of the opinion that his client cannot give him direction, he can move to convert or change his role from CAC to GAL.

Many sources exist within and outside the probate rules and statutes that can assist in reiterating or further defining the role of GAL versus CAC, such as Probate Rule 2(H) for definition of GAL, Probate Rule 18(B) regarding motion for appointment of GAL, Civil Rule 17(g) regarding the appointment of GAL in civil cases, A.R.S. Section 14-1408 for statutory authority for appointment of “representative” in proceedings under Title 14, and Family Law Rule 10 regarding representation of children, minors, and “incompetent” persons. With more clearly developed guidelines regarding the respective duties and expectations of CAC and GALs, the likelihood that both a CAC and GAL will be appointed in a case and the associated expense will be minimized.

As for the continued role of CAC or a GAL, we recommend that the CAC and/or GAL appointment be for a duration ordered by the court not to exceed one year. Before the expiration of the ordered period of representation, the CAC or GAL would be required to file a motion to withdraw setting forth the reasons why he believes the appointment is no longer necessary, or a motion for extension of the appointment setting forth why the ward or protected person, if represented by CAC, believes that continued representation is desired by the ward or protected person, or in the case of a GAL, why the GAL believes his continued involvement is in the ward’s or protected person’s best interest. This ensures that the court and the parties are doing their jobs in terms of assessing the ward or protected person’s current circumstances and ongoing needs, as well as the financial consideration attendant to continuing representation.”

The following is a draft of proposals to address those issues in Rule 10, Arizona Rules of Probate Procedure. The draft was circulated for consideration by Workgroup No. 1 members and for input from the Committee. This draft is ready for a vote by the Committee. For ease of reference, A.R.S. §§14-1406 and 1408 that are mentioned in the proposed Rule changes are attached.

In addition, this draft does not yet address other Rule changes that will be necessary if proposed rules are approved. Some of those other Rule changes are as follows:

1. Rule 2(H), Arizona Rules of Probate Procedure defining “Guardian Ad Litem”
2. Rule 18(B) Arizona Rules of Probate Procedure covering Motions for Appointment of Guardian Ad Litem.
3. Rule 17(g), Arizona Rules of Civil Procedure discussing appointing representation for infants or incompetent persons

Rule 10. Duties Owed By Counsel, Fiduciaries, And Unrepresented Parties~~To The Court~~

A. Duties of Counsel.

1. Responsibility to Court. Upon changing office address or telephone number, each attorney shall advise the clerk of court or the court administrator in each of the counties in which that attorney has probate cases pending of the attorney's current office address and telephone number.
2. Limited Scope Representation. Subject to the limitations in ER 1.2(c), Rules of Professional Conduct, an attorney may make a limited appearance by filing a notice stating that the attorney and the party have a written agreement that the attorney will provide limited scope representation to the party and specifying the matter or issues with regard to which the attorney will represent the party. Service on an attorney who has made a limited appearance for a party shall be valid, to the extent permitted by statute and Rule 4(f), Arizona Rules of Civil Procedure, in all matters in the case, but shall not extend the attorney's responsibility to represent the client beyond the specific matter for which the attorney has agreed to represent the client. Nothing in this rule shall limit an attorney's ability to provide limited services to a client without appearing of record in any judicial proceedings.

B. Duties of Unrepresented Parties.

1. An unrepresented party shall inform the court of his or her current address and telephone number. The person has a continuing duty to advise the court of any change in address or telephone number.
2. A person who is not an active member of the State Bar of Arizona or has not been admitted *pro hac vice* pursuant to the Rules of the Arizona Supreme Court may not represent family members or other lay persons during court proceedings.
3. A person who is not an active member of the State Bar of Arizona, an attorney admitted *pro hac vice* pursuant to the Rules of the Arizona Supreme Court, or certified as a legal document preparer by the Arizona Supreme Court may not prepare documents for another person to file with the court.

C. Duties of Court-Appointed Fiduciaries.

1. A court-appointed fiduciary shall
 - a. review all documents filed with the court that are prepared on the fiduciary's behalf
 - b. Refrain from attending court proceedings, including depositions, unless such attendance is required by law, court order, or other circumstances such that the fiduciary's attendance is necessary;
 - c. if the fiduciary is a licensed fiduciary who is not also an active member of the State Bar

of Arizona, place the fiduciary's license number on all documents signed by the fiduciary and filed with the court;

~~e~~d. file an updated probate information form that contains the information required by Rule 6 of these rules within ten days after any changes in such information, except that if the ward's physical address changes, the ward's guardian shall file the updated probate information form within three days of learning of the change in address; and

~~d~~e. in the case of an updated probate information form that reflects a change of a subject person's address or telephone number or a change of the fiduciary's address or telephone number, mail or deliver a copy of the updated probate information form to the subject person's court-appointed attorney, the subject person's guardian ad litem and all parties to the probate case in which the updated probate information form has been filed.

2. Duties Regarding Death of Ward or Protected Person. The court-appointed fiduciary shall do the following upon the death of the fiduciary's ward or protected person:

a. A guardian or conservator appointed pursuant to A.R.S. Title 14 shall notify the court in writing of the ward or protected person's death within ten days of learning that the ward or protected person has died.

b. Except as provided by in A.R.S. § 14-5419(F) or otherwise ordered by the court, a conservator shall file a final accounting of the protected person's estate within 90 days of the date of the protected person's death. The accounting shall reflect all activity between the ending date of the most recently approved accounting and the date of death of the protected person. The court may extend the date for filing the accounting or relieve the conservator from filing an annual or final accounting.

3. Termination of Appointment. Before a court-appointed fiduciary may resign from a case or have the fiduciary's responsibilities judicially terminated, the fiduciary shall comply with all statutory requirements for withdrawal, including the filing of final reports and accountings.

| D. Duties Relating to Counsel for Fiduciaries ~~Upon Withdrawal~~.

1. To minimize legal expenses incurred by the beneficiary of the fiduciary relationship, a fiduciary's attorney shall encourage the fiduciary to take those actions the fiduciary is capable of taking on the fiduciary's own rather than having the attorney take such actions on the fiduciary's behalf.

2. In addition to the requirements set forth in Arizona Rule of Civil Procedure 5.1, an attorney who has appeared in a probate case as counsel of record for a guardian, conservator, personal representative, or trustee shall include with any motion to withdraw a status report that advises the court and parties of any issues pending in the probate case and informs the court and parties whether, to the best of the attorney's knowledge, all required guardian reports, inventories, accountings, and other similar required reports have been filed.

E. Duties of Counsel for Subject Person of Guardianship/Conservatorship Proceeding.

In a guardianship or conservatorship proceeding, the participation of an attorney representing the subject person shall terminate upon the subject person's death. In extraordinary situations, the court, for good cause shown, may authorize the limited participation of the subject person's attorney after the subject person's death. In such cases, the court shall set forth, in its order authorizing the attorney's continued participation, the basis for the continued participation and the scope of the attorney's participation.

CREDIT(S)

Added Sept. 16, 2008, effective Jan. 1, 2009. Amended Sept. 2, 2010, effective Jan. 1, 2011.

Rule 10.1 Fiduciary's Authority to File Documents and Appear in Court Proceedings When Represented by Counsel.

A. Notwithstanding an attorney having appeared in a probate case on behalf of a fiduciary, the fiduciary who is represented by an attorney in a probate case may sign and file directly with the court the following documents:

- (1) Surety bond,
- (2) Proof of restricted account,
- (3) Inventory and appraisalment,
- (4) Annual report of guardian,
- (5) Annual account of conservator,
- (6) Proof of restricted account,
- (7) Proof of recorded restriction on real property,
- (8) Proof of use of funds,
- (9) Receipt of restricted funds by a former minor,
- (10) Petition for partial release of funds,
- (11) Fee waiver or deferral application,
- (12) Statement of competitive bids ordered pursuant to **Rule 10.1**, Arizona Probate Rules of Procedure,
- (13) Statement of the basis of the fiduciary's compensation in accordance with A.R.S. § 14-5109,
- (14) Good faith estimate of all projected monthly costs in accordance with **Rule 30.1**, Arizona Probate Rules of Procedure,
- (15) Annual operating budget pursuant to **Rule 30.4**, Arizona Probate Rules of Procedure,
- (16) Approval or denial of a claim against the estate, and
- (17) Closing Statement.

B. A fiduciary who files a document directly with the court pursuant to this rule shall be responsible for serving a copy of such document upon those persons who, by statute, court rule, or court order, are entitled to receive a copy of the document.

C. Upon motion by a fiduciary's attorney of record, the court may authorize the fiduciary to appear without legal representation in a particular court proceeding.

Comment

The court recognizes that fiduciaries represented by counsel may not need the services of counsel to file certain documents or appear in certain court proceedings. Oftentimes, the involvement of counsel is unnecessary and can be costly to an estate. Rule 10.1(A) sets forth a list of documents a represented fiduciary may file without counsel involvement. Nothing prohibits counsel from filing these documents, however, if the fiduciary and counsel believe it is in the best interest of the ward or protected person to do so. Rule 10.1(C) permits the court to authorize the fiduciary to appear in certain court proceedings without the attorney of record upon request by that attorney. It is anticipated that such requests will be made for routine court appearances that do not concern contested issues.

Rule 15.1 Appointment of Guardian Ad Litem.

A. Upon motion by any party or upon the court's own motion, the court may appoint a guardian ad litem pursuant to A.R.S. § 14-1408.

B. In connection with an adult guardianship or conservatorship proceeding, the court shall not appoint a guardian ad litem for the subject person unless, after notice and hearing as required by Article 3 of Chapter 5, A.R.S. Title 14, the court has found the subject person to be an incapacitated person.

1. In an adult guardianship proceeding, after the appointment of a guardian for the subject person and if the court finds by clear and convincing evidence that the subject person is incapable of communicating with the subject person's counsel in any meaningful way, the court may order that the subject person's court-appointed attorney act in the role of a guardian ad litem.
2. In an adult conservatorship proceeding, the court may order that the subject person's court-appointed attorney act in the role of a guardian ad litem if:
 - a. The court finds by clear and convincing evidence that the subject person is incapacitated and that the subject person is incapable of communicating with the subject person's counsel in any meaningful way; or
 - b. The court finds by a preponderance of the evidence that the subject person is missing.
 - c. A party requesting the appointment of a guardian ad litem shall make such request in a written motion that sets forth why the appointment is necessary or advisable and what, if

any, special expertise is required of the guardian ad litem.¹

d. The order appointing a guardian ad litem pursuant to this section shall clearly set forth the scope of the appointment, including the reasons for and duration of the appointment, rights of access as provided under the his rule, and the applicable terms of compensation.

e. A guardian ad litem appointed pursuant to this rule shall represent the best interest of the person for whom the guardian ad litem has been appointed.

f. Upon appointing a guardian ad litem, the court may enter an order authorizing the guardian ad litem to have immediate access to the person for whom the guardian ad litem has been appointed and all medical and financial records pertaining to such person, including records and information that are otherwise privileged or confidential. Upon receipt of a certified copy of such order, the custodian of any relevant record relating to a person for whom a guardian ad litem has been appointed shall provide the guardian ad litem with access to such record as authorized by the court's order. Failure to comply with such court order may subject the custodian to proceedings for contempt of court.

g. A guardian ad litem shall participate in the probate proceeding to the same extent as an attorney for any party.

h. A guardian ad litem may not engage in *ex parte* contact with the court except as authorized by law.

i. An attorney who is appointed as a guardian ad litem may not:

1. Be compelled to produce the attorney's work product developed during the appointment;

2. Be required to disclose the source of information obtained as a result of the appointment;

3. Submit a report into evidence; or

4. Testify in court.

j. Nothing in this rule shall alter the duty of a guardian ad litem to report neglect, abuse, or exploitation as required by law.

k. Rule 17(g), Arizona Rules of Civil Procedure, shall not apply to probate proceedings.

¹ This language is taken from existing Probate Rule 18(B). This portion of Rule 18(B) that deals with appointment of counsel should be stricken and moved to Probate Rule 19.

Comment

The appointment of a guardian ad litem is appropriate when the interests of a minor, an incapacitated person, an unborn person, or a person whose identity or location is unknown are either not represented at all or are not adequately represented. *See* A.R.S. § 14-1408(A). A.R.S. § 14-1408(B) allows the court to appoint a single guardian ad litem for more than one person if those persons have a common interest in the issue before the court. The guardian ad litem's role is to represent the best interest of the person(s) for whom the guardian ad litem has been appointed.

The appointment of a guardian ad litem for an adult who is the subject of a guardianship or conservatorship petition presents constitutional issues, particularly if the court has not yet made a finding that the subject person is incapacitated. Therefore, this rule prohibits the appointment of a guardian ad litem for an adult who is the subject person of a guardianship or conservatorship proceeding until the court has found, by clear and convincing evidence, that the subject person is an incapacitated person. Such a finding may be made only after the procedural protections afforded by the guardianship statutes.

§ 14-1406. Representation by fiduciaries and parents

To the extent there is no material conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

1. A conservator may represent and bind the estate that the conservator controls.
2. A guardian may represent and bind the ward if a conservator of the ward's estate has not been appointed.
3. An agent who has authority to act with respect to the particular question or dispute may represent and bind the principal.
4. A trustee may represent and bind the beneficiaries of the trust.
5. A personal representative of a decedent's estate may represent and bind persons interested in the estate.
6. A parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed, except that the parent may not represent the child to consent to a modification or a termination of a trust if the parent is the settlor of the trust.

CREDIT(S)

Added by [Laws 2008, Ch. 247, § 5, eff. Jan. 1, 2009](#).

§ 14-1408. Appointment of representative

A. If the court determines that an interest is not represented under this article or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, incapacitated person, unborn child or person whose identity or location is unknown. The court may appoint a representative for several persons or interests.

B. A representative may act on behalf of the person represented with respect to any matter arising under this title, whether or not a judicial proceeding concerning the trust or estate is pending.

C. In making decisions, a representative may consider general benefit accruing to the living members of the family of the person represented.

CREDIT(S)

Added by [Laws 2008, Ch. 247, § 5, eff. Jan. 1, 2009](#).